IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Writ Petition No.2464 of l994

Ferdinand Aloysius Francis Miranda..Petitioner
vs
The Mun Corpn of Gr Mumbai and anr..Respondents

Ms K N Velankar for petitioner
Mr. V.Mahadik fo respondent corporation

CORAM: A.P.SHAH & S.J.VAZIFDAR JJ.

Dated 3.3.2005

P.C:

Heard advocates.

l. The petitioner is the owner of a bungalow consisting of ground and one upper floor situated at St Alexius Road, Bandra, Mumbai. The petitioner is residing on the first floor and the ground floor is occupied by a tenant. It appears that the petitioner has planted trees, plants and shrubs and has painstakingly maintained them. A barbed wire fencing erected 20 years ago has been protecting these plants. The petitioner claims that the tenant’s nephew poured acid down an avocado plant which died and therefore to protect the plant he put up 8 prefabricated cement posts on the rear side and a new barbed wire fence was put up in

October l993.

2. On l5.l0.l993 a notice under section 354A of the Mumbai Municipal Corporation Act was issued to stop work of erecting the fencing. It appears that petitioner met officials of the Corporation explaining his difficulties and requested them to visit the site. It is alleged that the Junior Engineer of the Corporation refused to visit the site and threatened that he would remove the posts.

3. The petitioner filed Suit No.6655 of l993 in the City Civil Court at Mumbai on 25.l0.l993 inter alia praying for a declaration that the notice was illegal and for injunction restraining the respondents from enforcing the said notice. Ad-interim relief was granted in Notice of Motion No.5096 of l993 in the above suit filed by the petitioner. At the hearing of the notice of motion the learned Judge held that notice under section 354A did not give a right to file a suit since there would be a further notice required under section 35l. Hence he held that nothing survives in the suit. First Appeal No.292 of l994 filed by the petitioner challenging the order of the City Civil Court has been admitted and interim relief was granted on 7.4.l994. That First Appeal is

pending in this court.

4. It appears that thereafter a notice under section 53 of the Maharashtra Regionala and Town Planning Act, l966 dated 25.l0.l994 came to be issued by the respondent no 2 on the ground that the work has been undertaken without permission under the said Act. The petitioner by his reply dated 7.ll.l994 pointed out that the notice was malafide and illegal and called upon the respondent corporation to forthwith withdraw and cancel the notice and to confirm in writing to the advocate within one week that notice has been withdrawn. The respondents failed to do so and hence this petition.

5. The learned counsel appearing for the petitioner drew our attention to the relevant provisions of the MRTP Act. Sections 52(l) and 53(l) of the MRTP Act which are material for our purpose read thus:

> "52(l) Any person who, whether at his own instance or at the instance of any other person commences, undertakes or carries out development or institutes, or changes the use of any land,-

(a) without permission required under this Act, or

(b) which is not in accordance with any permission granted or in contravention of any condition subject to which such permission has been granted;

(c) after the permission for development has been duly revoked; or

(d) in contravention of any permission which has been duly modified, shall, on conviction be punished with imprisonment for a term which may extend to three years,or with fine which may extend to five thousand rupees or with both, and in the case of a continuing offence with a further fine which may extend to one hundred rupees for every day during which the offences continues after conviction for the first commission of the offence".

53(l) Where any development of land has been carried out as indicated in sub-section (l) of section 52, the Planning Authority may,

subject to the provisions of this section, serve on the owner a notice requiring him, within such period, being not less than one month,as may be specified therein after the service of the notice, to take such steps as may be specified in the notice.

a) in cases specified in clauses(a) or (c) of section 52, to restore the land to its condition existing before the said development took place.

b) in cases specified in clauses (c) or (d) of sub-section (l) of section 52, to secure compliance with the conditions or with the permission as modified.

Provided that, where the notice required the discontinuance of any use of land, the Planning Authority shall serve a notice on the occupier also".

6. The learned counsel appearing for the petitioner submitted that erection of a barbed wire fencing is not violative of the provisions of either section 53(l) or section 53(l) of the MRTP Act. He submitted that the fencing put up by the

petitioner within his compound does not amount to development or change of use of the land within the meaning of section 53(l) or section 52(l) of the Act. He submitted that the fence put up by the petitioner within his compound was meant to protect his trees and plants does not amount to a building or structure within the meaning of the Act and the notice has been issued only to circumvent the stay of notice issued by the Corporation granted by this court in First Appeal No. 294 of l994. We are inclined to accept the submission of the learned counsel for the petitioner that a barbed wire fencing has been put up to protect the plants and no building or development work as defined under the Act has been carried out nor there has been any change in use of the said land. The Corporation has not cared to reply to the petition though the petition is pending for more than 7 years. The learned counsel for the Corporation is unable to state on what basis the impugned notice has been issued that development has been carried on the land. The impugned notice is therefore illegal and is liable to be set aside.

Rule is accordingly made absolute in terms of prayer clause (a).